

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**June 4, 2013**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2012AP1649**

**Cir. Ct. No. 2010CV19536**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**MARK A. SALADIN AND DEBRA SALADIN,**

**PLAINTIFFS-APPELLANTS,**

**BUCYRUS INTERNATIONAL AND UNUM LIFE INSURANCE COMPANY OF  
AMERICA,**

**INVOLUNTARY-PLAINTIFFS.**

**v.**

**PROGRESSIVE NORTHERN INSURANCE COMPANY,**

**DEFENDANT-RESPONDENT,**

**PROGRESSIVE UNIVERSAL INSURANCE COMPANY, AMERICAN FAMILY  
MUTUAL INS. CO. AND NIKOLE L. VERDIN,**

**DEFENDANTS.**

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APPEAL from an order of the circuit court for Milwaukee County:  
TIMOTHY M. WITKOWIAK, Judge. *Reversed and remanded.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 BRENNAN, J. Mark A. Saladin and Debra Saladin appeal the circuit court’s summary judgment order dismissing Progressive Northern Insurance Company from their lawsuit. This insurance coverage dispute requires us to determine whether WIS. STAT. § 632.32(5)(j) (2009-10)<sup>1</sup> (authorizing certain “drive other car” exclusions) and § 632.32(6)(d) (prohibiting antistacking provisions in underinsured motorist (“UIM”) coverage) permit insurance companies to prohibit “stacking,” i.e., adding together UIM coverages, under separate policies, during the two-year period when both statutes were in force. Consistent with our recent decision in *Belding v. Demoulin*, 2013 WI App 26, 346 Wis. 2d 160, 828 N.W.2d 890 (petition for certiorari granted), we conclude that under these provisions, Progressive Northern’s “drive other car” exclusion cannot prevent stacking UIM coverages here. Thus, we reverse the circuit court’s summary judgment order dismissing Progressive Northern and remand for further proceedings consistent with this opinion.

## BACKGROUND

¶2 The material undisputed facts are as follows. On August 26, 2010, Mark Saladin was driving his 1992 Acura NSX on I-794 when he was struck by another vehicle. The other vehicle was driven by Nikole Verdin, who, at the time

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

of the accident, was traveling at a high rate of speed and in the wrong direction on the interstate. As a result of the collision, Mark sustained numerous severe injuries, requiring multiple surgeries.

¶3 The Acura that Mark was driving at the time of the collision was insured by American Family Insurance Company. The American Family policy provided UIM coverage. In addition to that vehicle, Mark also owned two Harley Davidson motorcycles, which were insured by Progressive Northern. The Progressive Northern policy included a provision for UIM coverage of up to \$100,000 per person and \$300,000 per accident.

¶4 The Saladins made UIM claims against American Family and Progressive Northern.<sup>2</sup> Progressive Northern denied coverage based upon the policy's "drive other cars" exclusion, which states: "Coverage under this Part III will not apply ... to a motorized vehicle or device of any type designed to be operated on the public roads and that is owned by you or a relative, other than a covered motorcycle." (Emphasis omitted.) The Saladins filed suit against Progressive Northern.<sup>3</sup>

¶5 Progressive Northern moved the circuit court for summary judgment, arguing that the "drive other cars" exclusion precluded coverage because Saladin was not driving a covered vehicle at the time of the accident. The Saladins argued that Wisconsin's Truth in Auto Insurance statute, specifically

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<sup>2</sup> The Saladins also filed suit against Verdin and her insurer, Progressive Universal Insurance Company. Both were dismissed from the case upon Progressive Universal's payment of its \$50,000 policy limit.

<sup>3</sup> There are numerous other parties to the lawsuit who we do not need to expressly name to resolve the issue raised on appeal.

WIS. STAT. § 632.32(6)(d), prevented Progressive Northern from enforcing the “drive other cars” exclusion with respect to UIM coverage.

¶6 The circuit court agreed with Progressive Northern and concluded that the “drive other cars” exclusion expressly prohibited stacking of UIM coverage and was valid because it complied with WIS. STAT. § 632.32(5)(j). The circuit court then granted Progressive Northern summary judgment and dismissed it from the case.

¶7 The Saladins appeal from the circuit court’s summary judgment order. After the parties completed briefing, the Saladins submitted a letter alerting us to *Belding*, a recent court of appeals decision released by District II, which the Saladins stated decided the issue presented to us in their favor. Having considered all of the parties’ submissions, we turn to the issue at hand.

## DISCUSSION

¶8 The Saladins contend that WIS. STAT. § 632.32(6)(d) precludes Progressive Northern from applying the “drive other cars” exclusion to UIM coverage. Section 632.32(6)(d) states that:

*No policy may provide that, regardless of the number of policies involved, vehicles involved, persons covered, claims made, vehicles or premiums shown on the policy, or premiums paid, the limits for any uninsured motorist coverage or underinsured motorist coverage under the policy may not be added to the limits for similar coverage applying to other motor vehicles to determine the limit of insurance coverage available for bodily injury or death suffered by a person in any one accident, except that a policy may limit the number of motor vehicles for which the limits for coverage may be added to 3 vehicles.*

(Emphasis added.)

¶9 Progressive Northern counters, and the circuit court agreed, that WIS. STAT. § 632.32(6)(d) is inapplicable to this case, and that § 632.32(5)(j) explicitly permits stacking exclusions for uninsured motorist (“UM”) and UIM coverage, like the “drive other cars” exclusion here.<sup>4</sup> Section 632.32(5)(j) states:

A policy may provide that any coverage under the policy does not apply to a loss resulting from the use of a motor vehicle that meets all of the following conditions:

1. Is owned by the named insured, or is owned by the named insured’s spouse or a relative of the named insured if the spouse or relative resides in the same household as the named insured.
2. Is not described in the policy under which the claim is made.

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<sup>4</sup> In its appellate brief, Progressive Northern claims that the “Saladins erroneously argue that ‘Progressive Northern is seeking to limit stacking of underinsured motorist coverage,’” and that instead, “Progressive Northern’s position has always been that there is simply no UIM coverage to be stacked.” (Record cites omitted.) We disagree. First, the record shows that the Saladins have accurately articulated Progressive Northern’s position now and at summary judgment. At the summary judgment hearing, Progressive Northern’s attorney summarized Progressive Northern’s position thusly:

[I]t is the defendant’s position that the statute that we’re referring to and relying upon, [WIS. STAT.] §[632.32(5)(j)], is still good law. ... And an insurance company is still allowed even under the “Truth in Auto Insurance” provisions to preclude coverage, whether it’s uninsured, whether it’s medical payments, [whether] it’s property damage, whether it’s bodily injury, based upon the fact that the person was operating a vehicle that isn’t listed in the policy.

In other words, Progressive Northern’s argument on summary judgment was exactly as the Saladins, and now this court, have stated, that is, Progressive Northern seeks to limit stacking of insurance coverage pursuant to § 632.32(5)(j). Second, to the extent that Progressive Northern’s argument is as it now states—that there is no UIM coverage to stack—it is simply attempting to artfully rephrase its old argument. The parties agree that the Saladins’ Progressive Northern insurance policy provides UIM coverage for Mark’s motorcycles. The question is whether the policy’s “drive other cars” exclusion, which prohibits using that UIM coverage for another vehicle not listed in the policy, is valid. However Progressive Northern wishes to package its argument, the issue before us is the same.

3. Is not covered under the terms of the policy as a newly acquired or replacement motor vehicle.

¶10 For the reasons set forth in more detail below, we agree with the Saladins, reverse the circuit court’s grant of summary judgment, and remand for further proceedings.

¶11 This case requires us to review the circuit court’s order for summary judgment. We review a grant of summary judgment by applying the standards set forth in WIS. STAT. § 802.08(2) (2011-12), just as the circuit court applied those same standards. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Where, as here, the facts are not in dispute, the only question on review is whether the moving party is entitled to judgment as a matter of law. *See Teschendorf v. State Farm Ins. Cos.*, 2006 WI 89, ¶9, 293 Wis. 2d 123, 717 N.W.2d 258.

¶12 Here, while the parties debate the meaning of WIS. STAT. §§ 632.32(5)(j) and (6)(d) at length, including detailed arguments concerning the statutes’ language and legislative history, we need not resolve the debate because we have already done so in *Belding*. *See id.*, 346 Wis. 2d 160, ¶¶7-18. For our purposes, it suffices to say that the parties agree that the Progressive Northern policy is governed by §§ 632.32(5)(j) and (6)(d), which were only simultaneously in effect for a short-lived period of time between 2009 and 2011. *See id.*, ¶11.

¶13 In *Belding*, not decided until after appellate briefing in this case had been completed, we decided the exact issue raised by the parties here but with respect to UM coverage, as opposed to UIM coverage: “whether auto insurance policies could prohibit ‘stacking’ ... coverage limits for uninsured motorist ... coverage under multiple policies owned by the same insured, during a two-year

period when both ... §§ 632.32(5)(j) ... and 632.32(6)(d) ... were in force.” See *Belding*, 346 Wis. 2d 160, ¶1 (footnote omitted). We concluded that “the law in place from November 1, 2009, until November 1, 2011, is that ‘drive other car’ exclusions during that period could not prevent insureds from stacking together their UM coverage limits for up to three vehicles owned and insured by the same insured.” *Id.*, ¶21. We see no logical reason why our ruling in *Belding* should not apply equally to UIM coverage.

¶14 We noted in *Belding* that WIS. STAT. § 632.32(5)(e) sets forth a two-part test for determining the validity of automobile insurance exclusions, stating that “[a] policy may provide for exclusions not prohibited by sub. (6) or other applicable law.” See *id.*; see also *Belding*, 346 Wis. 2d 160, ¶15. As such: (1) “if a prohibition enumerated under § 632.32(6) applies, then the exclusion is barred”; and (2) “if no enumerated prohibition applies, we consider whether any other law bars the exclusion.” *Belding*, 346 Wis. 2d 160, ¶15. “If neither § 632.32(6) nor ‘other applicable law’ bars the exclusion, it is permissible.” *Belding*, 346 Wis. 2d 160, ¶15.

¶15 In *Belding*, applying the WIS. STAT. § 632.32(5)(e) test to an insured’s claim that a “drive other cars” exclusion could not prohibit UM stacking, we concluded that “because § 632.32(6)(d) prohibited antistacking of multiple UM coverages, the ‘drive other car’ policy exclusion otherwise permitted under § 632.32(5)(j) is barred.” *Belding*, 346 Wis. 2d 160, ¶16. We went on to state that:

§ 632.32(6)(d) prohibited **any policy provision** that prevented the adding together of UM coverage limits under multiple UM coverages “regardless of the number of policies involved, vehicles involved, persons covered, claims made, vehicles or premiums shown on the policy, or premiums paid.” Thus, as required by § 632.32(5)(e),

neither the “drive other car” exclusion nor any other exclusion could stop the [insureds] from adding together separate UM coverages they had purchased for their own vehicles.

**Belding**, 346 Wis. 2d 160, ¶16.

¶16 That here the parties are arguing over UIM coverage as opposed to UM coverage is of no matter. The statutes involved are exactly the same. Our conclusion in **Belding** that this is the only interpretation that “gives effect to all the applicable provisions under the statutory scheme” still holds true regardless of whether we are addressing UM or UIM coverage. *See id.*, ¶18.

¶17 We also note one other factual distinction between this case and **Belding**, which we conclude is of no matter. While here, Progressive Northern only insured Mark’s motorcycles, and did not insure the Acura Mark was driving at the time of the accident, in **Belding**, the insurance company attempting to enforce the “drive other cars” exclusion also insured the car being driven by the insured at the time of the accident. *See id.*, ¶¶2-4. Neither the plain language of the statutory provisions or the logic under the decision in **Belding** depend in any respect on what insurance company wrote a particular policy. The insurance company that wrote the policy at issue is of absolutely no consequence to our analysis.

¶18 In sum, for the reasons set forth above, we reverse and remand for further proceedings.

*By the Court.*—Order reversed and remanded.

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